In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1508

VERNON EGGE,

Petitioner,

v.

CHARLES DAVIS, Public Utility Commissioner of the State of Oregon,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

BRIEF FOR RESPONDENT IN OPPOSITION

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SUBJECT INDEX

TABLE OF AUTHORITIES

Cases Cited

Statutory Provisions

Other Authorities

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SUPPLEMENTAL STATEMENT OF THE CASE

Petitioner's statement of facts is accepted with the following additions or corrections. The Public Utility Commissioner ("Commissioner") sent the certified mail notice of December 3, 1974, to petitioner at his address as it appeared in the Commissioner's records, which had been petitioner's regular business address for about ten years. The post office made two attempted deliveries of the letter before returning it to the Commissioner, intact, on January 2, 1975.

During the course of the audit, the Commissioner's auditor went to petitioner's place of business twice to

obtain documents and spoke with petitioner about the audit on both occasions. On one of these occasions the auditor gave petitioner a round figure estimate of the tax deficiencies he had found. On one later occasion, petitioner went to the regional PUC field office, without an appointment, and inquired about the results of the audit. Petitioner's auditor was absent, but another man in the office showed petitioner the contents of the file, without detailed explanation.

REASON FOR DENYING THE WRIT

The statutory notice requirements followed in this case are in accord with the due process principles of Mullane v. Central Hanover Bank & Trust Co.

The statutory notice requirements of ORS 767.855(1) and ORS 756.068, which the Public Utility Commissioner satisfied in this case, are in accord with *Mullane v. Central Hanover Bank & Trust Co.*, 339 US 306 (1950). *Mullane* does not require actual notice, rather it requires adoption of some reasonable means of constructive notice.

> ". . . The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, [citations omitted] or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring

> home notice than other of the feasible and customary substitutes." *Mullane v. Central Hanover Bank & Trust Co.*, 339 US at 315 (1950).

Here the statutes required either regular or certified mail, directed specifically to the audited carrier, as the means of notice. In highway use tax situations direct mailing is reasonably certain to inform one affected, because petitioner as a pervasively regulated motor carrier has an official address of record where he receives regular correspondence, and which he is required by administrative rule to keep current. The facts thus are different from those in *Mullane*, where the Court held that notice by newspaper publication was an unreasonable choice for affected persons whose names and addresses were at hand.

In later cases, the Court dealt with situations where the notice was not such as one desirous of informing a person would reasonably adopt. In *Covey v. Somers*, 351 US 141 (1956), the Court held that notice by mail and by publication was not sufficient to enable tax foreclosure where all the officials and citizens of a town knew the taxpayer to be an incompetent without mental capacity to understand the meaning of any notice served upon her. In *Schroeder v. New York*, 371 US 208 (1962), the Court held that notice by publication and by scattered posting in the affected area, as required by the New York City Water Supply Act, was not sufficient notice to an absentee property

owner to enable condemnation where no sign was placed on the specific property and where the city easily could have found the owner's name in official records. The city was constitutionally obliged to make at least a good faith effort to inform the owner that she had a right to be heard on a claim for compensation, ". . . an obligation which the mailing of a single letter would have discharged." *Schroeder v. New York*, 371 US at 214 (1962).

The Commissioner's choice of a means of notice had none of the apparent unreasonableness present in *Covey* and *Schroeder*. There was nothing about petitioner's circumstances (such as the incompetency factor in *Covey*) to suggest that on December 3, 1974, the use of certified mail would fail to apprise petitioner of the additional tax assessment. The notice in fact had safeguards beyond those required, because the Commissioner selected certified mail, a means inherently more likely to arrive at the appropriate address than regular mail. Furthermore, the person affected was one who knew that a periodic audit had taken place, and who knew that there would be an additional assessment.

Knowledge of the fact of non-receipt in a particular case does not violate due process, because the due process test looks to the means of notice selected, not to the results.

> ". . . But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied. 'The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals.' [Citations omitted]" *Mullane v. Central Hanover Bank & Trust Co.*, 339 US at 314-15 (1950).

Although the use of certified mail makes possible the return of a letter marked unclaimed, whereas the use of regular mail might not, imputed knowledge of non-delivery creates no new duty to "re-calculate" the notice. If the method of notice chosen in this case on December 3, 1974, was reasonable, then notice was effective on that day. The Commissioner's standard procedure of immediately sending a returned notice by regular mail, without altering its content, did not cancel the legal effect of the earlier notice. The remailing was no more ". . . reasonably calculated, under all the circumstances, to apprise [petitioner] of the pendency of the action." *Mullane, supra*, 339 US at 314. Nor did the Commissioner have the authority, voluntarily or involuntarily, thereby to toll the period after notice for producing a final tax assessment, a limited period incorporated in the state's legislative scheme for collecting highway use taxes.

CONCLUSION

The opinion of the Court of Appeals of the State of Oregon in *Egge v. Davis*, 27 Or App 383, 556 P2d 153 (1976), is in accord with the principles of Fourteenth Amendment due process and the applicable decisions of this Court. The petition should be denied.

Respectfully submitted,

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